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UNITED STATES OF AMERICA

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	:	
CWM Chemical Services, Inc. Chemical Waste Management, Inc., and Waste Management, Inc., Respondent.	:	Docket No. II TSCA-PCB-91-0213

JUDGE'S RULINGS ON MOTION TO DISMISS
MOTIONS FOR ACCELERATED DECISION
AND MOTION TO SUPPLEMENT

Environmental Protection Agency
Office of Administrative Law Judges
401 M Street, S.W.
Washington, D.C.

Thursday, March 18, 1993

The bench decision in the above-entitled matter was convened, pursuant to notice, at 10:06 a.m.

BEFORE:

JUDGE JON G. LOTIS, Administrative Law Judge

APPEARANCES:

On behalf of the Complainant:

LEE A. SPIELMANN, ESQ.
DAVID GREENLAW
DANIEL KRAST
Assistant Regional Counsel, Region 2
Waste and Toxic Substances Section
Air, Waste and Toxic Substances Branch
Office of Regional Counsel

On behalf of the Respondent:

ROGER C. ZEHNTNER, ESQ.
Kirkpatrick & Lockhart
One International Place
Boston, Massachusetts 02110-2600

GREIG SIEDOR, ESQ.
CWM Chemical Services, Inc.

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C O N T E N T S

	PAGE
Complainant's July 10, 1992 Motion to Supplement	10
Respondents' April 7, 1992 Motion for Accelerated Decision and May 29, 1992 Second Motion for Accelerated Decision	12
Complainant's Arguments Concerning Notice and Equitable Estoppel	23
Respondents' Motion to Dismiss	34

- - -

P R O C E E D I N G S

JUDGE LOTIS: We're on the record. First for purposes of the record I would ask that beginning with the complainant indicate who is on this conference call and when you give the name would you please spell it for the purpose of the reporter. For the complainant?

MR. SPIELMANN: I'm Lee Spielmann. L-e-e S-p-i-e-l-m-a-n-n. I'm the assistant regional counsel at EPA Region 2. Along with me is David Greenlaw also with the EPA. Greenlaw is spelled G-r-e-e-n-l-a-w as well as there is a possibility that a Daniel Krast may come. He's not here now. I believe he's having problems with transportation. He might come here but as of now he is not here.

JUDGE LOTIS: Could you just spell his name too?

MR. SPIELMANN: Daniel Krast with a K-r-a-s-t but to repeat as of 10:10 he is not here.

JUDGE LOTIS: Thank you.

For the respondent?

MR. ZEHNTNER: Representing the respondent are Roger Zehntner. That's R-o-g-e-r Z-e-h-n-t-n-e-r. Jennifer Tucker, J-e-n-n-i-f-e-r T-u-c-k-e-r and Greig Siedor, G-r-e-i-g S-i-e-d-o-r.

JUDGE LOTIS: Thank you. I was designated to preside in this proceeding by order of the Chief Judge dated February 10, 1993. I handed the reporter a copy of the that designation and I ask that he copy it into the record at this point as if read.

#1

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
CWM Chemical Services, Inc., Chemical Waste Management, et al.,	)	Docket No. II-TSCA-PCB-91-0213
	)	
	)	
Respondents	)	

ORDER OF REDESIGNATION

Administrative Law Judge Jon G. Lotis, Environmental Protection Agency, Washington, D.C., is hereby redesignated as the Administrative Law Judge to preside in this proceeding under Section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), pursuant to Section 22.21(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (40 CFR 22.21(a)).

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: February 10, 1993

Washington, D. C.

JUDGE LOTIS: On February 11, 1993 I issued an order requiring the submission of a joint status report by the parties. I've handed a copy of that to the reporter and I ask that he now copy that into the record as if read.

#2

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of CWM Chemical Services, Inc., Chemical Waste Management, Inc., and Waste Management, Inc., Respondent	Docket No. II-TSCA-PCB-91-0213

ORDER REQUIRING SUBMISSION OF JOINT STATUS REPORT

On February 10, 1993 the undersigned was designated to preside in this proceeding. To assist me in bringing this case to resolution, the parties are directed to file a joint status report on or before February 26, 1993. The report shall not exceed 5 pages and shall include the following information:

1. A short chronological history containing an overview of significant procedural events. (Include the dates of prehearings and hearings that may have been held).

2. Whether the prehearing exchange contemplated by Section 22.19(b) of the EPA Rules of Practice (40 CFR §22.19(b)) has been completed.

3. A list of motions and/or other pleadings (if any) pending before the administrative law judge and not yet acted upon. (Include the date of the motion(s) and/or pleadings.

4. The status of settlement discussions and the prospects for settlement.

5. Such other information the parties wish to bring to my attention that will aid in the future scheduling and disposition of this case.

To allow me to make the quickest and most efficient use of the status report, the parties are directed to furnish the information using the headings 1-5 as noted above. The status report shall not be the vehicle for the argument of any party's position.

The action taken herein is without prejudice to such further action that I may take in this proceeding prior to the receipt of the status report.

Jon G. Lotis
Administrative Law Judge

Dated: February 11, 1993

JUDGE LOTIS: That status report was submitted by letter dated February 26, 1993. In that report the parties both agree that in order to expedite this case a ruling should be made on the following three motions of the respondents: the December 6, 1991 motion to dismiss, the April 7, 1992 motion for accelerated decision and the May 29, 1992 second motion for accelerated decision.

Counsel for complainants also seek a ruling on its July 10, 1992 motion to supplement its response to the April 7, 1992 motion for accelerated decision.

By order dated March 12, 1993 I called this conference for the purpose of ruling on those motions. I hand a copy of that order to the reporter at that point for purposes of copying into the record. I ask him to do that at this point.

#3

UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
CWM Chemical Services, Inc.,	)	Docket No.
Chemical Waste Management, Inc.,	)	II TSCA-PCB-91-0213
and Waste Management, Inc.,	)	
	)	
Respondent	)	

NOTICE OF ON-THE-RECORD PREHEARING TELEPHONE CONFERENCE
FOR PURPOSE OF RULING ON MOTION TO DISMISS,
MOTIONS FOR ACCELERATED DECISION,
AND MOTION TO SUPPLEMENT

This is to serve notice that an on-the-record prehearing telephone conference with a court reporter will be held on March 18, 1993 commencing at 10:00 a.m. The conference is convened for the limited purpose of issuing my ruling orally on the following three motions of the Respondents : (1) the December 6, 1991 Motion to Dismiss (2) the April 7, 1992 Motion for Accelerated Decision and (3) the May 29, 1992 Second Motion for Accelerated Decision. I will also rule on Complainant's July 10, 1992 Motion to Supplement. No further argument or business will be entertained.

At my direction, Counsel for Respondents and Complainant have been notified by telephone of this conference by one of the law clerks in this Office.

Shortly after joining the EPA as an Administrative Law Judge on February 8, 1993, I was assigned the caseload of Judge Yost who retired in September 1992. There were approximately 100 cases on his docket. Many of those cases are awaiting rulings on significant substantive motions--rulings which would influence the future course and, in certain situations, the ultimate disposition of the cases.

Under these circumstances, I find that effective case management dictates that I rule on these motions as expeditiously as possible. To this end, whenever I deem appropriate, I will rule on motions orally from the Bench. In this particular case, I estimate I will save about 60 days with an oral as opposed to written ruling.

Jon G. Lotis
Administrative Law Judge

Dated: March 12, 1993

MR. SPIELMANN: Your Honor,--

JUDGE LOTIS: I am--I'm sorry.

MR. SPIELMANN: --Daniel Krast has just entered the room.

JUDGE LOTIS: Thank you, counsel.

As I proceed I will be following my notes which I took during the course of my review of the pleadings and I hope to create a story here telling it from the beginning to end, making all the key points that would be made as if the ruling was issued in written form.

I have reviewed the motions and related pleadings and I will now rule.

I'll be begin with the complainant's July 10, 1992 motion to supplement. That motion is granted. I will also accept respondents' July 20, 1992 response to that motion. It is not my practice to accept continual rounds of pleadings, but coming into this case somewhere near midstream I find that the more prudent course of action in this situation is to accept the pleadings that have been filed to date.

Before I proceed with my ruling and findings on the merits I'd like to set the stage with some background information. Hopefully, it will give the reader of this

transcript a self contained document which will explain the events and circumstances leading up to my rulings as well as the rulings themselves.

EPA filed it's complaint against respondents on March 13, 1991. The named respondents are CWM Chemical Services, Inc., Chemical Waste Management, Inc., and Waste Management, Inc.

Complainant alleges that between February 2, 1984 and October 20, 1987 respondents illegally disposed of about 500 loads of waste, also referred to sometimes in the pleadings as sludges, at their hazardous waste disposal facility at Model City, New York. The waste loads apparently were coming from the General Motors central foundry located in Massena, New York.

Complainant alleges that the waste contained polychlorinated biphenyls in excess of 500 parts per million or "regulated as if present in excess of 500 parts per million because of dilution." Polychlorinated biphenyls or perhaps better known to most through their acronym, PCBs. Complainant seeks a total of $7,075,000 in civil damages.

In a pleading dated March 31, 1992 respondents moved for a partial stay of these proceedings with respect to

allegations in the complaint related to activities occurring prior to March 15, 1986. That is more than five years prior to the filing of the complaint. Respondents relied on a federal statute of limitations which they argue is applicable to these penalty proceedings. In an April 21, 1992 order Judge Yost granted respondents' motion for a stay of these proceedings to the extent that they may be effected by the statute of limitations issue. The stay was granted pending a ruling by the D.C. Circuit Court of Appeals in a case referred as the 3M case.

Both parties argued that the issues before me relate only to the complainants' claims alleging that respondents illegally disposed of 260 loads of General Motors waste between June 26, 1986 and October 20, 1987. The penalty associated with those alleged violations amount to $3,425,000.

I will turn first to the respondents' April 7, 1992 motion for accelerated decision and their May 29, 1992 second motion for accelerated decision. I will discuss and rule on them jointly because they are closely related and rely on much the same arguments.

In these motions respondents argue that the EPA

relied on dry weight measurement of PCBs in determining whether they had exceeded the 500 parts per million concentration referred to in the EPA regulations. Respondents contend that the EPA regulations do not require a dry weight basis of measurement. Respondents argue that the "as is" or wet weight basis of measurement shows that the PCB concentrations were below the 500 parts per million legal ceiling. Before I go on it's probably helpful at this point to explain the difference between dry weight measurement and as is or wet weight measurement.

Dry weight measurement shows the concentration of PCBs in the waste sample after the waste sample is dried in the laboratory. The as is or wet weight basis of measurement shows the PCB concentration in the waste sample before drying. Since the drying drives off moisture and other constituents, but leaves the PCBs in tact, a higher concentration of PCBs will exist in that sample after drying than had existed in the waste before drying. Before drying the indicated concentration of PCBs in the waste would be less because they would exist in combination with moisture and other constituents in the waste.

This, I understand, is--and I appreciate--is an over

simplification of the technical processes involved in sampling and testing for PCB concentrations, but I believe it will suffice for purposes of understanding and providing context to the parties argument.

The difference between the dry weight and as is basis for measuring PCB concentrations is dramatic. For example, a June 23, 1987 sludge sample shows a dry weight PCB concentration of 600 parts per million and a wet weight PCB concentration of 21 parts per million. An August 25, 1987 sludge sample shows a dry weight PCB concentration of 780 parts per million and a wet weight PCB concentration of 31 parts per million. These figures come from complainant's Exhibits 6 and 7 to its memorandum in opposition to the respondents' motion to dismiss.

Respondent makes these basic arguments in support of its motions for accelerated decision. One, the PCB regulations applicable to respondents' disposal of waste from June 26, 1986 through October 20, 1987 contain no requirement that PCB concentrations be determined on a dry weight basis. Two, nor did such a requirement exist under either EPA approved test methods or respondents' landfill approval which it received from EPA. Three, to the extent that EPA is

asserting that it has always insisted on dry weight PCB testing in its dealings with the regulated community, respondents charge that EPA is illegally imposing its dry weight policy as a binding rule in violation of the administrative procedure acts, notice and comment requirements.

MR. SPIELMANN: Judge Lotis?

JUDGE LOTIS: Yes.

MR. SPIELMANN: Can I interrupt? I truly apologize. Our phone is breaking down. I missed approximately the last 10 minutes. I would say I missed most of it. May I request a five minute break so we can obtain a speaker phone that's working properly. I truly apologize but we're having technical problems.

JUDGE LOTIS: Certainly. We're off the record now.

[Off the record.]

JUDGE LOTIS: During the off the record session to make up for the breakdown in communications that the Region 2 office with the speaker phone I had the reporter play back the entire portion of my ruling that the complainant might have missed. So we're up to date now and let me go on from there.

I'll begin with the complainants' central arguments. They are these:

One, according to the complainants the question here is whether the respondents had or could have had through the exercise of reasonable diligence any notice of what the complainant refers to as the requirement that PCBs be measured on a dry weight basis.

Two, according to complainants the issue here is one of constructive notice. The complainants put it this way and I will quote them, "In light of the fundamental scientific precepts should respondents have known as sophisticated corporate operators of a state of the art PCB disposal facility that dry weight PCB concentration determinations were required." That comes from page 25 to 26 of complainant's memorandum in opposition to the respondents' first motion for accelerated decision. Complainants say this is a question of fact that may only be resolved after full development of a factual record and is not a matter of summary disposition.

Three, complainant argues that a secondary issue concerns whether respondents should be equitably estopped from raising arguments that they did not know dry weight

measurements were required. In this regard, complainant argues that respondents submitted to EPA certain data reflecting PCB concentrations on a dry weight basis and that available scientific information would have provided respondents with notice of that requirement.

Lastly, four, complainants contend the EPA had a dry weight basis policy and that it was subject to notice and comment as required by the Administrative Procedure Act. This last argument appears at page 2 of the complainant's memorandum in opposition to the second motion for accelerated decision.

Upon review and consideration of the parties arguments the motions for accelerated decision are granted. EPA may not assess penalties against respondent on the basis of dry weight testing for the period in question. The findings supporting this conclusion are these:

One, the issue before me is one of law not one of fact. Was the respondent under some legal obligation to perform dry weight testing in determining the level of PCB concentration in its waste?

Two, I begin by a search for the source of this legal obligation. Were the case laws clear? Unless fair

warning is given by the agency of the conduct prohibited or the conduct required, no violation can occur. Cases supporting this proposition are abundant. See for example Phelps Dodge Corporation v. Federal Mine, Safety and Health Review Commission, 681 Fed 2d. 1189 at page 1192. That's a 9th Circuit decision issued in 1982. Also Rollins Environmental Services, Inc. v. United States Environmental Protection Agency, that case is cited 937 Fed 2d. 649 at page 654, a D.C. Circuit decision issued in 1991 and Gates & Fox Company v. Occupational Safety and Health Review Commission, it's cited as 790 Fed 2d. 154 at page 156, a 1986 D.C. Circuit decision. I also refer the parties to the cases cited in those decisions.

Three, you will recall the period involved here is June 26, 1986 through October 20, 1987, when the respondent is said to be in violation of EPA's alleged legal requirement for dry weight testing. What vehicle or mechanism did the EPA use to give respondent fair warning of a legal requirement to use dry weight testing for PCB concentration during this period?

Four, the EPA regulations did not require dry weight testing during this period. A brief background of the

PCB regulations as they relate to dry weight testing is called for at this point.

Five, the regulations governing the disposal of PCBs are contained in 40 CFR part 761. The applicability section is Section 761.1 and the definition section is 761.3.

Six, the dry weight basis was used for purposes of defining a PCB mixture under the original PCB disposal regulations promulgated in 1978. The dry weight basis was used again for purposes of defining what PCB materials were regulated under the 1979 amended version of the PCB regulations.

Seven, on July 10, 1984 when the EPA revised its PCB regulations again in response to a December 8, 1983 proposed rule making, the phrase "on a dry weight basis" was eliminated. In its final order the EPA gave no reason for its omission.

Eight, On April 6, 1990 EPA issued a notice seeking comments on a proposed rule which would add the phrase "dry weight basis" to the PCB regulations. The EPA has not taken any action on the proposed rule to my knowledge to date, so at this point the proposed rule is still outstanding.

Nine, complainant made copies of all relevant

portions of the Federal Register involving the PCB rule changes that I have just mentioned and to make as much as possible this transcript to be a self contained document I would invite any party reviewing this subsequently to look at Exhibits 1 through 7 of complainant's memorandum in opposition to respondents' second motion to accelerated decision where the portions of the Federal Register that I've just described have been reproduced by complainant.

Ten, complainants argued that the elimination of the requirement for dry weight testing in the publication of the July 10, 1984 PCB regulations was inadvertent. Complainant points to the April 6, 1990 notice of proposed rule making where the EPA refers to the omission in 1984 as inadvertent and seeks to reinsert the phrase in the regulations.

Eleven, the disposition of this issue does not turn on whether the omission of the dry weight language from the regulations in 1984 was inadvertent or by design.

Twelve, rather the issue is whether respondents were under a legal obligation in the 1986, 1987 period in question to measure its waste on a dry weight basis.

Thirteen, the answer to that inquiry is that the

respondents had no such legal obligation.

Fourteen, once the dry weight language was eliminated from the regulations in 1984 and no attempt was made to restore it to the regulations for six years it becomes academic whether the omission was an intentional one or a result of inadvertence.

Fifteen, the simple fact is that the EPA has not had a regulation in effect since 1984 requiring that testing for PCBs be done on a dry weight basis. With its April 6, 1990 proposed rule making to restore the dry weight testing requirement still outstanding, the regulated community cannot be charged with penalties for failing to obey a proposed regulation that has not been adopted.

Sixteen, I should point out that we are not talking about a situation where an agency makes a ministerial or administrative error in the publication of a final rule and the agency immediately acts to correct it.

Seventeen, here we are talking of about a gap of almost nine years since the dry weight language was a part of the EPA's PCB regulations. With the April 6, 1990 rule making still outstanding that gap grows.

Eighteen, the EPA's April 6, 1990 notice of rule

making seeking comments on its proposed reinsertion of the dry weight requirement into its regulations would be redundant and unnecessary if, as complainants now assert, the dry weight requirement had been in effect since 1978 without interruption.

Nineteen, further, neither EPA's landfill approval nor EPA's approved test methods required respondent to use the dry weight basis for determining PCB concentrations.

Twenty, EPA's January 1985 approval of the Model City Secure Landfill Facility 11 referred to as SLF-11 is Exhibit 2 to Mr. Greenlaw's affidavit submitted as part of complainant's memorandum in opposition to respondents' first motion for accelerated decision.

Twenty-one, EPA's approved analytical method in 1986 to 1987 protesting PCB concentrations was method 8080 contained in SW 846 Second Edition. This method does not require or reference dry weight testing.

Twenty-two, while engaging in much argument on this matter complainant is unable to show a dry weight requirement included as part of EPA's approval of the Model City Secure Landfill Facility 11 or as part of the EPA's approved analytical method in 1986 to 1987 for testing PCB

concentrations.

At this point I'd like to go on now to complainants' arguments concerning notice and equitable estoppel.

Twenty-three, I find complainant's notice and equitable estoppel arguments to be without legal foundation and contrary to basic principles and concepts underlying the Administrative Procedure Act. There is nothing here that respondents can be held responsible for taking notice of.

Twenty-four, complainant refers to "fundamental scientific precepts" that respondents as sophisticated corporate operators of a state of the art PCB facility should have known. Complainant posed this question, "Should respondents be permitted ignorance of basic information and knowledge for one in the field?" This comes from page 26 of complainant's memorandum in opposition to respondents' first motion for accelerate decision.

Twenty-five, the Administrative Procedure Act recognizes two ways for an administrative agency to formulate policy that will have the force of law. An agency may establish binding policy through rule making procedures by which it promulgates substantive rules or through adjudications which constitute binding precedent. I would

refer the parties to the case of Pacific Gas and Electric v. Federal Power Commission, it's at 506 Fed 2d. 33 specifically at page 38. That's a 1974 D.C. Circuit decision and I also refer the parties to the cases cited in that PG&E case. I commend counsel attention to reading the entire case since it sheds considerable light on matters of the sort that we have here.

Twenty-six, "fundamental scientific precepts," no matter how widely accepted cannot be transformed into binding legal requirements. To do so would trample those rights and protections afforded by the Administrative Procedure Act. I'd like to quote from the APA, specifically Section 553(c).

"After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments with or without opportunity for oral presentation. After consideration of the relevant matter, presented the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."

Also I refer the parties to the attorney general's manual on the Administrative Procedure Act 1947 in which on page 9 appears a description under Roman Numeral I of a

section called Fundamental Concepts, "The Administrative Procedure Act may be said to have four basic purposes. One, to require agencies to keep the public currently informed of their organization, procedure and rules. Two, to provide for public participation in the rule making process."

Also page 26 of that same attorney general's manual under Roman Numeral III is a discussion of the intent of Section 4 of the rule making section and let me quote.

"In general the purpose of Section 4 is to guarantee to the public an opportunity to participate in the rule making process. With stated exceptions each agency will be required under this section to give public notice of substantive rules which it proposes to adopt and to grant interested persons an opportunity to present their views to it. Where rules are required by statute to be made on the record after opportunity for an agency hearing the provisions of Section 7 and 8 as to hearings and decisions will apply in place of the less formal procedures contemplated by Section 4(v). With certain exceptions no substantive rule may be made effective until at least 30 days after its publication in the Federal Register. Section 4 also grants to interested persons the right to petition an agency for the issuance, amendment or repeal of a

rule."

The fundamental scientific precepts which complainant appears to be elevating to the status of agency policy appeared neither in a rule nor written policy statement of the agency. Assuming for purposes of argument these precepts were expressed in the form of a written policy statement of the EPA they still could not be enforced as binding except after case adjudication to determine the policy's applicability to the particular regulated entity. Again, I refer the parties to the Pacific Gas and Electric case, especially pages 37 through 40 of that case.

Twenty-eight, the fundamental scientific precepts which complainant rely upon reside neither in a rule nor EPA policy statement, instead they are the opinions of experts which complainant presents through various affidavits attached to its pleadings.

Twenty-nine, no matter how well established the scientific precepts may be the fact remains that the regulated community is entitled as a matter of due process to fair notice and opportunity to comment on any proposal which would change the current rule. In this case a rule which does not contain a dry weight requirement.

Thirty, I should note at this point that when the EPA finally issued its notice in April of 1990 to reinstate the dry weight language in its PCB regulations comments and opposition were submitted by the respondents. Apparently the scientific precepts which complainants subscribe to may not be universally held.

Thirty-one, the legal void that was created since the dry weight language was removed from the regulations in 1984 and what to do about it were issues under active consideration within the EPA.

Thirty-four, I turn next to a November 28, 1989 internal memorandum from Charles L. Elkins, Director of EPA's Office of Toxic Substances. In that memo he identifies the use of dry weight versus wet weight analysis for determining PCB content as one of the four major gridlock issues forwarded for resolution through the expedited PCB rule interpretation process. The memorandum and related paper were included as attachment C to respondents' first motion for accelerated decision. I hand a copy of that document now to the reporter and ask that he copy it into the record as though read. It consists of the memo which I described and an attachment consisting of four pages and a cover page.

#4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 28 [illegible]

OFFICE OF
PESTICIDES AND TOXIC SUBSTANCES

MEMORANDUM

SUBJECT: First Four Issue Resolution Decisions from The Expedited PCB-Rule Interpretation Process

FROM: Charles L. Elkins, Director
Office of Toxic Substances

TO: Addressees

Four major, gridlocked issues have been forwarded for resolution through the Expedited PCB-Rule Interpretation Process (EPIP). These issues involve (1) disposal of PCB container rinsate (less than 50 ppm); (2) use of wet weight versus dry weight analysis for determining PCB content; (3) the scope of 40 CFR 761.60(A)(4); and (4) regeneration, reuse and disposal of PCB-contaminated filter media

I am glad to say that resolution has been reached on each of the issues. To close out the process on these issues, I am forwarding to you the final issue resolution decision documents written for each of the issues. It is now the responsibility of each of us to ensure that these decisions are incorporated into all relevant actions by our respective offices.

I want to thank each of the people who served on the four Advisory Groups. Special thanks to Elizabeth Mack (OTS), David Hannemann (OTS), David Batson (OECM), and Jan Bearden (OCM) for chairing the advisory groups.

Attachments

EPIP ISSUE NUMBER 2

DETERMINATION REGARDING USE OF WET WEIGHT OR DRY WEIGHT ANALYSIS FOR DETERMINING PCB CONTENT

EXPEDITED PCB-RULE INTERPRETATION PROCESS

FINAL ISSUE RESOLUTION DECISION

November 27, 1989

I. ISSUE STATEMENT

The issue to be resolved is whether the PCB concentration in contaminated sludges, soils, etc. should be determined on a wet weight basis or a dry weight basis.

II. BACKGROUND

In the final Uncontrolled Rule published on July 10, 1984, the phrase "on a dry weight basis" was deleted from the applicability portion of the regulations at 40 CFR 761.1. This change was not identified as such in the proposed rule, and the rulemaking record fails to clarify why the change was made.

The issue of analysis by wet or dry weight is important because of the difference in the disposal requirements based on PCB concentrations. Wet weight analysis results in a lower PCB concentration than dry weight analysis because of the affect the moisture content has on the material. Analysis on a wet weight basis could allow PCB materials to be improperly disposed.

III. OPTIONS IDENTIFIED

OPTION 1: Status Quo. Allow the situation to remain unchanged.

PRO

- Will allow current enforcement case to proceed.
- Does not require rulemaking.

CON

- Continues vagueness for analytical requirements in PCB materials because of the absence of explicit "on a dry weight basis" language in the regulations.
- Provides a possible source of confusion to the regulated industry over analytical requirements.
- May place Agency in a weakened enforcement position.
- Will delay commitment of rulemaking resources to minor amendment of PCB rules.

Environmental Impact.

Could permit sludges, soils, etc., to bypass PCB disposal requirements entirely or opt for less stringent disposal requirements; e.g. landfilling instead of incineration.

Potential Economic Impact.

Could reduce or increase the cost of disposal depending on analysis or disposal method.

Legal Impact.

Could weaken enforcement cases because there is no current regulatory requirement to analyze sludge, soils, etc., on a dry weight basis. Could weaken the Agency's enforcement of the PCB disposal regulations.

OPTION 2: Issue policy stating Agency recognizes sludges, soils, etc. containing PCBs must be analyzed "on a dry weight basis".

PRO

- Will state Agency policy.
- Will avoid use of rulemaking resources.
- Will be effective upon signature by OPTS management.
- Will support enforcement cases.
- Will reaffirm Agency intent in analyzing PCB containing sludges on a dry weight basis.
- Will support enforcement case, because states that "on a dry weight basis" is the method of choice chosen by the Agency.

CON

- Has poor legal backing or status.
- Could emphasize to the regulated community that the dry weight language is no longer in the regulations.
- Could damage the particular enforcement case. (Based on correspondence history, GM has, since 1979, questioned the analysis of PCBs in sludge on a dry weight basis.)

Environmental Impact.

Would permit materials to bypass PCB disposal requirements entirely or opt for less stringent disposal requirements; e.g. landfilling instead of incineration. Would establish disposal criteria for sludges, soils, etc,. as incineration because of the principal of dilution.

Potential Economic Impact.

Could reduce or increase the cost of disposal depending on analysis or disposal method.

Legal Impact.

Weakens enforcement cases because there is no current regulatory requirement to analyze sludge on a dry weight basis. Could weaken the Agency's enforcement of the PCB disposal regulations.

OPTION 3: Amend regulations to reinstate parenthetical phrase "on a dry weight basis" into the applicability section of the PCB rules.(40 CFR 761.1).

PRO

- Will re-establish explicit regulatory basis for analyzing sludges, soils, etc., containing PCBs on a dry weight basis.
- Will eliminate ambiguity in regulatory requirement.
- Will restore Agency enforcement capability to require industrial sludges, soils, etc., to be disposed of based on their PCB concentration analyzed on a dry weight basis.
- Reaffirms Agency's position to analyze sludges, soils, etc., on a dry weight basis.

CON

- Will emphasize gap in explicit regulatory requirements. (From July 1984 until rule becomes effective.)
- Will require commitment of valuable rulemaking resources.
- Will require approximately one year before becoming effective.
- Could create additional burdens in Paperwork Reduction, Regulatory Flexibility and Information Collection requirements.

Environmental Impact.

Could permit materials to bypass PCB disposal requirements entirely or opt for less stringent disposal requirements; e.g. landfilling instead of incineration. Could establish disposal criteria for sludges, soils, etc., as incineration because of the principal of dilution.

Will require PCB materials to be disposed of in a controlled manner based on the regulations.

Potential Economic Impact.

Could reduce or increase the cost of disposal depending on analysis or disposal method.

Legal Impact.

Re-establishes and confirms legal basis and rationale for analysis of sludges, soils, etc., on a dry weight basis. Will strengthen enforcement cases by requiring analysis of sludges on a dry weight basis.

IV. ISSUE RESOLUTION

All parties to the resolution agree that it has been Agency policy since 1978 to determine PCB concentrations in sludge via use of dry weight measurements. Option 1 was not acceptable because of the continuing confusion of the regulated community and the weakening of the Agency's enforcement position. Option 2 was rejected because a policy statement did not improve the Agency's enforcement position over Option 1. Option 3 was agreed upon because it will allow clear statement of Agency policy and be enforceable. To carry out this option, the Office of Toxic Substances will undertake a minor rulemaking clarification to reinstate the parenthetical phrase "on a dry weight basis" into the applicability section of the PCB regulations.

JUDGE LOTIS: While complainant and respondent draw out different conclusions from that document complainant does not challenge the use of the document on grounds that it is an internal document. I should also point out at this time that that same document was referred to by the court in the Rollins case and in that case it was used to show some disagreement within EPA circles on the interpretation of another regulation.

Thirty-five, I'd like to discuss for a few moments the Elkins' memorandum and the accompanying advisory group paper. I do so for two reasons. First, to show that within EPA circles there was an awareness of the omission of the dry weight requirement from the regulations in 1984 and second, to show that there was a recognition of the vagueness and confusion that may exist as a result in the regulated community as to the analytical requirements for measuring PCB concentrations.

Thirty-six, the advisory group recognized the lack of a dry weight requirement in the existing regulations. It discusses three options to cure the situation. Option one, the status quo, do nothing; option two, issue policy statement and option three, amend the regulations to reinstate dry

weight language. The group had listed the pros and cons of each alternative.

Thirty-seven, the advisory group listed as a con for the do nothing option, that is the option which would allow the present rule to remain in effect and I quote them at this point, "continues vagueness for analytical requirements in PCB materials because of the absence of explicit on a dry weight basis language in the regulations," and "provides a possible source of confusion to the regulated industry over analytical requirements."

Thirty-eight, in discussing the cons of a policy statement the advisory group said this--and I'll quote-- "could emphasize to the regulated community that the dry weight language is no longer in the regulation."

Thirty-nine, as to option three which would reinstate the dry weight language listed on the pro side of the ledger were these items, "will reestablish explicit regulatory bases for analyzing sludges, soils, et cetera, containing PCB on a dry weight basis." "Will eliminate ambiguity in regulatory requirement," and "will restore agency enforcement capability to require industrial sludges, soils, et cetera, to be disposed of based on their PCB concentration

analyzed on a dry weight basis."

Forty, as one of the cons for reinstating the dry weight language in the regulations the advisory group said that it "will emphasize gap in explicit regulatory requirement (from July 1984 until rule becomes effective)."

Forty-one, after discussion of the pros and cons of each option the report concludes that "option one was not acceptable because of the continuing confusion of the regulated community and the weakening of the agency's enforcement position." "Option two was rejected because a policy statement did not improve the agency's enforcement position over option one." "Option three was agreed upon because it will allow clear statement of agency policy and be enforceable."

Forty-one, the advisory group's report makes reference at various points to "agency policy," "agency intent" and "agency position." The report concludes "all parties to the resolution agree that it has been agency policy since 1978 to determine PCB concentration in sludge via use of dry weight measurements."

Forty-two, in whatever form the so-called agency policy may have existed after the removal of the dry weight

language from the regulations in 1984 there was no legally binding dry weight requirement in effect.

Forty-three, I strongly suspect that since the report rejected the policy statement option the agency policy that the memorandum is referring to is the apparently common held in-house opinions and beliefs of individuals within the EPA, however, those opinions and beliefs were never published by the EPA in the form of a rule or a written policy statement after the elimination of the dry weight requirement in 1984.

Forty-four, in making its equitable estoppel argument complainant contends that respondent provided PCB disposal information at the Model City Facility on a dry weight basis and that once it rejected a waste containing PCBs in excess of 500 parts per million on a dry weight basis.

Forty-five, complainant misses the legal mark. EPA either has or does not have a legally enforceable regulation in effect.

Forty-six, an enforceable regulation cannot be established by the actions or conduct of the regulated community or that of its employees.

Forty-seven, the problems created by the

complainants' approach are obvious. For example, how does the regulated community know of the existence of an unpublished policy? What individual or groups of individuals have responsibility for formulating unpublished policy? This is particularly important because you have to be certain that you are following the "right" policy if there happens to be a difference of opinion within the EPA. How do you know when that unpublished policy has changed? How do you know when the old unpublished policy ceases to be effective? How do you know when the new unpublished policy is to be effective? Getting down to cases take for example a waste disposal company that never rejected materials with PCB concentrations in excess of 500 parts per million on a dry weight basis and never reported to EPA on a dry weight basis. Would that company escape penalty? Of course under complainants' arguments one would revert back to the issue of constructive notice. At this point we are back where we started. How does one discover unpublished policy? Who makes unpublished policy, et cetera?

Finally and most important, under complainant's approach the question must be asked at what point, if any, does the regulated community have a right to participate in

the formulation of unpublished policy?

Forty-eight, fortunately all these questions were resolved almost 50 years ago with the passage of the Administrative Procedure Act. Agency policy carrying the force of law can only be established two ways, upon issuance of an agency order after providing notice and opportunity to comment or after individual case adjudication.

Forty-nine, the wisdom underlying the principles of fairness and due process embodied in the Administrative Procedure Act are best appreciated when one considers the facts and circumstances of this case.

We'll be off the record a moment.

[Off the record.]

JUDGE LOTIS: We'll be back on the record.

[Pause.]

JUDGE LOTIS: I turn next to respondents' motion to dismiss. The motion to dismiss again relates to the same time frame covered by respondents' motions for accelerated decision, that is June 26, 1986 through October 20, 1987.

Respondent argues that for this period the actual PCB concentrations of each of the waste loads disposed of was below 500 parts per million. Respondent cites to an affidavit

attached to that pleading. Respondent says that it shows the actual PCB concentrations of the 260 loads of General Motors waste during this period to range from a non-detectable to 378 parts per million with an average concentration of 45 parts per million.

Complainant argues that the motion must be denied because respondents have failed to demonstrate that the actual PCB concentration of each of the 260 shipments was not in excess of 500 parts per million. Complainant takes issue with the affidavit attached to the respondents' motion and argues one, that there is insufficient information available to verify the accuracy and reliability of the figures shown, two, the affidavit leaves doubt as to the personal role of the affiant in conducting the analysis and in the procedures by which the samples were taken and her knowledge of those procedures, and three, the assertions in the affidavit appear to conflict with and to be contravened by documentary materials complainant has received from the generator of the waste loads as discussed in Mr. Greenlaw's affidavit attached to the complainant's memorandum. Complainant concludes that these are all factual questions that cannot be answered based on the pleadings.

I have reviewed the complaint and the answer as well as the respondents' motion to dismiss, complainant's memorandum in opposition and respondent's reply.

The motion is granted. My findings are these. One of the underlying assumptions on which the complaint is built is that for this time period the respondents were under a legal obligation to measure PCB concentrations on a dry weight basis. In its memorandum in opposition to the motion to dismiss complainant says on page 7 through 8--and I will quote--"The dispositive issue here upon which issue hinges whether or not respondents are entitled to the relief they seek is whether such load had a actual PCB dry weight concentration in excess of 500 parts per million." They then say that all future references to PCB concentration are specifically to actual dry weight concentration.

I have today held that there was no legal requirement in place for the period in question that would have obligated respondents to measure PCB concentrations on a dry weight basis. The complaint does not make the claim that respondents have disposed of PCB concentrations in excess of 500 parts per million on an "as is" or wet weight basis. The claim that complainant makes is bottomed on its belief that

the dry weight basis of measurement is the law.

To show that the respondents may have exceeded the 500 parts per million legal requirement complainants point to certain examples on page 18 of its memorandum in opposition to the motion to dismiss.

On that page complainant refers to the affidavits submitted by Mr. Greenlaw referring specifically to paragraphs 39, 40 and 52 of that affidavit. The pleading states and the related exhibits, I should say, 6, 7 and 9. The pleading states that "Mr. Greenlaw presents evidence (paragraphs 39, 40 and 52 of the Greenlaw affidavit also Exhibits 6 and 7, Exhibit 9 thereto) that indicate actual PCB concentrations of digester sludge samples (the source of the waste that are the subject of respondents' instant motion) above 500 ppm which samples appear to have been taken during the time in question (June 27, 1986 to October 20, 1987)."

I've made copies of those exhibits and I will hand them to the reporter at this time and ask that they be copied into the record. First, Exhibit 6 attached to Mr. Greenlaw's affidavit will be copied into the record at this point.

#5

Exp. 1

Client: GM-Central Foundry Division

UPSTATE LABORATORIES, INC.

Report #: 071387009
Date: July 13, 1987

PCB Analysis

CLIENT I.D.	ULI CODE	PCB CONCENTRATION 1221	1016	1242	1248	1254	1260	TOTAL
2432 Reclaim Oil	17587026				110			110 ppm
2433 Digester Sludge 6-23-87	17587027		"		21 * 600 **			21 * 600 **
2434 CPI Sludge 6-23-87	17587028				61 * 2100 **			61 * 2100 **

*Results are expressed as ppm as rec'd.
**Results are expressed as ppm dry wgt.
NYS DOH I.D.: 10170

Approved:

JUDGE LOTIS: As you will see from that exhibit it shows that one the June 23, 1987 digester sludge sample it shows a PCB concentration of 21 on a wet weight basis and 600 on a dry weight basis.

I hand the reporter a copy of Exhibit 7 attached to Mr. Greenlaw's affidavit and ask that you copy it into the record at this point.

#6

Ex. 7

Client: GM-Central Foundry Division

UPSTATE LABORATORIES, INC.
PCB Analysis

Report #: 091487008
Date: September 14, 1987

CLIENT I.D.	ULI CODE	PCB CONCENTRATION 1221	1016	1242	1248	1254	1260	TOTAL
2706 CPI Sludge 8/25/87	23887061				110 * / 1300 **			110 * / 1300 **
2707 Digester Sludge 8/25/87 8-25-87	23887062				31 * / 780 **			31 * / 780 **
2708 Reclaim Oil 8-25-87	23887063							150 ppm

*Results are expressed as mg/kg as rec'd.
**Results are expressed as mg/kg dry wgt.
NYS DOH I.D.: 10170

Approved:

JUDGE LOTIS: If you refer to Exhibit 7 you'll see that the digester's sludge sample shown on that page indicates a wet weight concentration of PCBs of 31 and a dry weight concentration of 780.

I hand the reporter Exhibit 9 attached to Mr. Greenlaw's affidavit which consists of two pages both designated page 4 but one is designated with a date of September 23, 1986 and the other one with a date of August 20, 1986.

#7

Ex 9

Client: GM-CFD

Report #: 82086001
Date: August 20, 1986

UPSTATE LABORATORIES, INC.
PCB Analysis

CLIENT I.D.	ULI CODE	PCB CONCENTRATION 1221	1016	1242	1248	1254	1260	TOTAL
1687, CPI Effluent	19086002				9.0 ug/l			9.0 ug/l
1688, Clarifier Effluent	19086003				1.7 ug/l			1.7 ug/l
1689, Mill Water	19086004				5.5 ug/l			5.5 ug/l
1692, Activated Sludge	19086007				4.2 ppm as recd 180 ppm dry wgt			4.2 ppm 180 ppm
1696, CPI Sludge	19086008				32 ppm as recd 1900 ppm dry wgt			32 ppm 1900 ppm
1697, Digester Sludge 7-4-86	19086009				31 ppm as recd 770 ppm dry wgt			31 ppm 770 ppm

Approved: [signature]

8/20/86

Ex 9

Client: GM-CFD

UPSTATE LABO. ORIES, INC.

PCB Analysis

Report #: 92386020
Date: September 23, 1986

CLIENT I.D.	ULI CODE	PCB CONCENTRATION 1221	1016	1242	1248	1254	1260	TOTAL
176., Reclaim Oil 8-14-86	22686011				27 ppm			27 ppm
1768, Digester Sludge 8-14-86	22686012				26 ppm as recd 540 ppm dry wgt			26 ppm 540 ppm
1769, CPI Sludge	22686013				10.8 ppm as recd 250 ppm dry wgt			10.8 ppm 250 ppm
1770, Activated Sludge	22686014				10 ppm as recd 420 ppm dry wgt			10 ppm 420 ppm
1771, Lost Foam Softener	22686015				1.37 ug/l			1.37 ug/l
1761, M-8 Pit Sludge	22686016				55 ppm as recd 990 ppm dry wgt			55 ppm 990 ppm
1762, Filter Press Cake 8-12-86	22686017				140 ppm as recd 330 ppm dry wgt			140 ppm 330 ppm
1763, Lost Foam Sand (RCRA)	22686018							<0.10 ug/l

DUPLICATE

Approved: [signature]
9/23/86

JUDGE LOTIS: Referring to the September 23, 1986 document it shows a digester sludge sample on line 2 with a PCB concentration of 26 on an as is or as received basis as it states there and 540 parts per million on the dry weight basis.

Referring to that same Exhibit 9 the other page which is a August 20, 1986 dated it shows a digester sample on that as having a concentration of 31 parts per million on an as received basis or wet weight basis as we've been referring to it and a 770 parts per million on the dry weight basis.

Under these circumstances I find that complainant has not made the assertion let alone a prima facie case in the complaint that the respondent has disposed of PCBs measured on an as is basis in a concentration greater than 500 parts per million. Accordingly, the motion to dismiss is granted.

That completes my rulings. I do have a few items to take up with respect to where we go from here and let me start with Section 22.20(a)(2) of the agency's Consolidated Rules of Practice. That section requires that--and let me quote it here--"If an accelerated decision or a decision to

dismiss is rendered on less than all issues or claims in the proceeding the presiding officer shall determine what material facts exist without substantial controversy and what material facts remain controverted in good faith. He shall thereupon issue an interlocutory order specifying the facts which appear substantially uncontroverted and the issues and claims upon which the hearing will proceed."

The issues that remain in this case are those issues covered by the counts of the complaint related to the period February 2, 1984 through June 25, 1986. This portion of the transcript where I've designated that as the issue will constitute my "interlocutory order" in satisfaction of the requirement of that section.

I refer to parties to Section 22.19(c) and let me quote that section so this transcript will be as self contained as possible. "No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing conferences, no transcript of any prehearing conferences shall be made unless ordered by the presiding officer upon motion of a party or sua sponte. The presiding officer shall prepare and file for the record a written summary of the action taken at the conference. The

summary shall incorporate any written stipulations or agreements of the parties and all rulings and appropriate orders containing directions to the parties."

I construe that portion of that quoted section which requires a written summary to apply to those instances where the prehearing is off the record. To me this is a reasonable interpretation since the rules do not require the Judge to prepare and file a written summary during the course of the trial every time he makes a ruling which could be referred to as an interlocutory ruling.

Also, with respect to the time when the clock starts ticking for an appeal, I believe a reasonable construction of the rules would be one which would suggest that the issue date of this decision for purposes of appeal should be the date when the transcript becomes available to the parties through the EPA's regional hearing clerk. That's my construction in any event.

Upon receipt of the transcript I will review it and by separate order, if necessary, I will make transcript corrections. However, I wish to advise the parties that I am not going to make corrections in spelling, grammar, syntax or anything other than something that I might have misstated or

something that bears on the substance of my ruling. Upon review of the transcript I will--if I'm not going to have any transcript corrections, which I may not--I will put out a notice and fax it to both parties here immediately to that effect, but that in any event if the transcript is to be corrected at all I will put an order out within a day or two of my receipt of the transcript and we will fax it to both parties as to what corrections have been made. So that I think a fair reading of the rules would suggest that notwithstanding a transcript correction the time for an appeal should start running perhaps from the time the transcript becomes available prior to correction unless there were going to be substantial corrections to be made in which case I'm sure either side could ask for additional time of the Appeals Board for filing such an appeal.

In any event, I would suggest that the parties be liberal in their interpretation of the rules and I say that for this reason that this form of ruling by a phone, by an oral ruling as opposed to written ruling, will allow me to expedite the many cases I have on my docket and that I read the rules as not to prohibit this particular procedure. If we do get caught up in an entanglement on procedures with

respect to oral rulings from the bench or even in initial decisions from the bench via oral rulings, then I think ultimately the process which takes a considerable amount of time already will slow down even further.

That is all I had. This prehearing--let me just check notes to see if there's anything else I failed to cover. There is not. This prehearing is adjourned. Thank you very much.

[Whereupon, at 11:25 a.m., the bench decision was adjourned.]

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C-E-R-T-I-F-I-C-A-T-E

I, Thomas Giancola , the Official Court Reporter for Miller Reporting Company, Inc., hereby certify that I recorded the foregoing proceedings; that the proceedings have been reduced to typewriting by me, or under my direction and that the foregoing transcript is a correct and accurate record of the proceedings to the best of my knowledge, ability and belief.

Thomas Giancola

CERTIFICATE OF SERVICE

I hereby certify that the **Transcript** by Administrative Law Judge **Jon Lotis** in the matter of **CWM Chemical Services, Inc., Chemical Waste Management, Inc, and Waste Management Inc., Docket No. II TSCA-PCB-91-0213**, was filed on **April 2, 1993**. I served copies of the **Transcript** to the parties as indicated below:

First Class Mail - **Honorable Jon Lotis**
Chief Administrative Law Judge (A-110)
US Environmental Protection Agency
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Washington, D.C. 20460

Hand-Delivered - **Lee Spielmann, Esq.**
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Karen Maples
Regional Hearing Clerk
USEPA - Region II

Dated: **April 2, 1993**